No. 554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES POTASH COMPANY, DIVISION OF UNITED STATES BORAX & CHEMICAL CORPORATION, *Petitioner*,

v.

LOCAL 1912, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM FOR RESPONDENT

PLATO E. PAPPS
GILBERT W. CHRISTENSEN
1300 Connecticut Avenue, N. W.
Washington 6, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

A. T. MONTOYA
501 Fourth Street, N. W.
Albuquerque, New Mexico

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Authorities Cited

Cases: Page

Celanese Corporation of America and United Construction Workers, Local 153, AAA Case No. L-24473, CHA-L-52-59, sl. op. p. 29 3

Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board, 357 U.S. 93 7

Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17 7

Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 7

United Steelworkers of America v. America Manufacturing Co., No. 360, October Term, 1959 2

United Steelworkers of America v. Warrior & Gulf Navigation Company, No. 433, October Term, 1959 2

Statutes:

Labor Management Relations Act, 1947, Section 301 1

Miscellaneous:

Shulman, Reason, Contract, And Law In Labor Relations, 68 Harv. L. Rev. 999 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 554

UNITED STATES POTASH COMPANY, DIVISION OF UNITED STATES BORAX & CHEMICAL CORPORATION, *Petitioner*,

v.

LOCAL 1912, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MEMORANDUM FOR RESPONDENT

The essential question presented by the petition is whether, in a suit for specific performance of a promise to arbitrate brought under Section 301 of the Labor Management Relations Act, 1947, the court below applied a proper standard in concluding that a refusal to submit a dispute to arbitration violated a promise to arbitrate contained in a collective bargaining agreement. The court below stated that (270 F. 2d 496, 498):

> Judicial determination of arbitrability, i.e., whether the employer has agreed to arbitrate the

> underlying grievance, necessarily involves a modicum of interpretation of the contract, and, to that extent overlaps the interpretive functions which primarily belong to the arbitrator. But, we do not reach the "ultimate issues of contract interpretation that determine the outcome of the controversy." Goodall-Sanford, Inc. v. United Textile Workers, 1 Cir., 233 F. 2d 104, 107. We interpret only to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract. If so, the judicial function is at an end and the proper interpretation of the contract is for the arbitrator.

It observed that "we cannot deny arbitrability unless we can say with positive assurance that the contract is not susceptible to an interpretation to cover the asserted dispute" (270 F. 2d at 498), and it concluded that in this case "it is plain that the grievance dispute does not lie wholly outside the provisions of the contract, and arbitration is therefore enforceable" (270 F. 2d at 499).

But for circumstances presently to be mentioned, we would oppose the grant of the petition because the decision is plainly correct, the court below having applied a proper standard with sensitive attention to the appropriate function of court and arbitrator. However, we believe we are precluded from opposing certiorari by this Court's grant of the writs to review the question of the proper standard to be applied in determining arbitrability in *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, No. 433, October Term, 1959, and *United Steelworkers of America* v. *American Manufacturing Co.*, No. 360, October Term, 1959. In view of these grants of the writ, we believe that the alternatives this Court will

consider in this case are whether to grant the petition forthwith and set the case for argument immediately following *Warrior & Gulf*, or to defer action on the petition pending the outcome of *Warrior & Gulf* and *American Manufacturing*. In this posture we urge that the petition in this case be granted forthwith. And for these reasons.

It is hard to overstate the importance, in its impact upon the day-to-day administration of collective bargaining agreements, of the standard to be employed in determining arbitrability. Depending on its content the standard can significantly enhance or markedly hinder the essentially private system of jurisprudence which contracting employers and unions have evolved and brought to a high degree of sophistication and effectiveness through their own efforts. Concern that the role of the judiciary in the arbitral process would be dislocating caused a master of the art to "suggest that the law stay out. . . ."[1] The law is now in but the character of its participation has confirmed trepidation in responsible quarters as to the influence it would exert. "The great breach between the philosophies of most judges and most Arbitrators in deciding matters of arbitrability of grievances under labor agreements" has been observed.[2] The tendency of courts to generalize has been contrasted with the arbitral approach where "in virtually every case in which arbitrability has been denied the Arbitrator has carefully avoided

[1] Shulman, *Reason, Contract, And Law In Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955).

[2] Arbitrator G. Allen Dash, Jr., in *Celanese Corporation of America* and *United Construction Workers, Local 153*, AAA Case No. L-24473 CHA-L-52-59, sl. op. p. 29 (unpublished). Mr. Dash is President of the National Academy of Arbitrators.

dogmatic statements or generalizations and has confined his denial of arbitrability to the specific facts and circumstances of the case."[3]

This Court therefore bears a heavy responsibility, we believe, to formulate a standard of arbitrability in which the role of law is consonant with the arbitral process. To discharge this responsibility the Court should have all the light that can be cast upon the problem. Explicit consideration of this case in conjunction with the other two will, we think, aid significantly in laying the problem bare. For there are differences between this case and the other two which are important, not because application of a proper standard of arbitrability will not require the submission of all three to arbitration, but because the differences vividly highlight the considerations which should be irrelevant to arbitrability.

Our point is illustrated by two dissimilarities between this case and *Warrior & Gulf*. The cases typify a fairly common and recurrent dispute relating to the engagement of independent outside contractors to do work which has been or can be done by the employer's own employees. The employer contends that in the absence of an express prohibition in the agreement it is free to contract work to others, while the union maintains that the agreement contains an implied covenant against divesting the unit of employees of work it is capable of performing. Consideration of the two cases together tellingly demonstrates, with a force that separate consideration does not command, the irrelevance to the question of arbitrability of two factors heavily relied upon to show its absence. Thus:

[3] *Id.* at p. 28.

(1) The Court of Appeals in *Warrior & Gulf*, in holding that the dispute was not arbitrable, strongly stressed that the union had in negotiating the agreement unsuccessfully "sought to include a provision prohibiting the company from contracting out some of its work" (269 F. 2d 633, 636). In the instant case, on the other hand, there is no such history. But is it not plain that the absence or presence of such a history is germane to the *arbitrator's* determination of the *merits* of the dispute and not to a *court's* determination of its *arbitrability?* For while the presence of that history detracts from the cogency of the union's claim that the agreement impliedly prohibits contracting work to others, its relevance goes to whether the agreement will bear the interpretation the union claims, not to whether the arbitrator has been designated by the agreement as the person to make that determination. And under an agreement which commits disputes as to interpretation or application to the arbitrator, whether an agreement will or will not support a particular interpretation is for him to say.[1] Any other view tends to mean that, as in this case, arbitrability would exist because the merits are unembarrassed by an adverse contract history, and that, as in *Warrior & Gulf*, it would not exist because the merits seem murkier. To travel this route is to bog the single question of *who* is to decide the merits of the dispute in the minutiae of *how* the merits should be decided.

(2) In *Warrior & Gulf* the dispute pertains to the employer's action in contracting with outside firms to perform "*maintenance* work" on its barges (269 F. 2d

[1] As Judge Rives shows in his dissenting opinion, there are additional reasons why the history of prior negotiations is not relevant to arbitrability in *Warrior & Gulf*, 269 F. 2d at 639, n. 5.

at 635, emphasis supplied). In this case the employer claims that it contracted with an independent firm "for certain *new* construction work and the installation of *new* machinery at the premises of the mine" (Pet. for Cert. p. 4), and it strongly stresses that a "dispute over contracting *original* construction and installation work" is not arbitrable (*id.* at pp. 9-12, emphasis supplied). But is it not again plain that the difference between "*maintenance* work" and "*new* construction" is germane, if germane at all, to the arbitrator's determination of the merits of the dispute and not to a court's determination of its arbitrability? For the kind of work contracted by the employer to others, as compared to the kind of work normally performed by its own employees, is relevant, if at all, to the question whether it is the sort of work that the employer has impliedly covenanted to do with his own force. But the kind of work in dispute is not at all relevant to the separate question whether the agreement has committed the determination of the dispute to the arbitrator. Any other view would mean that it makes a difference, in deciding the arbitrability of a dispute, whether the dispute pertains to new construction or maintenance work. A federal law of arbitrability cannot be grounded in such details.

In short, in our judgment, a workable concept of arbitrability must divorce inquiry into the merits of the dispute from the question whether the agreement requires submission of the dispute to arbitration. Juxtaposition of this case with *Warrior & Gulf* and *American Manufacturing* serves to identify the factors which should be irrelevant to arbitrability, and hence makes their joint consideration desirable.

This Court has not infrequently set down for plenary consideration three cases presenting interlocking questions.[5] Sound judgment would be enhanced by following that course here. We therefore urge that the petition in this case be granted forthwith and the case set for argument immediately following *Warrior & Gulf*.

Respectfully submitted,

PLATO E. PAPPS
GEORGE W. CHRISTENSEN
1300 Connecticut Avenue, N. W.
Washington 6, D. C.

BERNARD DUNAU
912 Dupont Circle Building
Washington 6, D. C.

A. T. MONTOYA
501 Fourth Street, N. W.
Albuquerque, New Mexico.

Attorneys for Respondent.

December 1959.

[5] *E. g., Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, combining three cases in one opinion; *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448, in conjunction with 353 U.S. 547, and 353 U.S. 550; *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, combining three cases in one opinion.